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Precluding the Absent Claimant from Re-Arguing Class Certification: Pragmatism and the "Day in Court" Ideal

BY ALEXANDER MOESER*

I. INTRODUCTION

In the recent case *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*,[1] the Seventh Circuit accorded broad preclusive effect to the denial of class certification in a previous case[2] when a subsequent claimant attempted to have the same class certified in a different court.[3] In doing so, the Seventh Circuit broke new ground. The Supreme Court has never squarely faced the issue, and no other court has approached the issue in the same manner or drawn the same conclusion.[4] The Seventh Circuit's decision raises fundamental questions about fairness and due process in the context of the class action system.[5]

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* J.D. expected 2005, University of Kentucky. The author would like to thank Professor Mary J. Davis for suggesting the *Bridgestone* case as the subject for this Note.

[1] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003).

[2] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, Gustafson v. Bridgestone/Firestone, Inc., 537 U.S. 1105 (2003).

[3] *See Bridgestone*, 333 F.3d at 769.

[4] *See, e.g.*, J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996) (finding that a subsequent claimant could not be bound by another court's denial of certification); Furey v. Geriatric & Med. Ctrs., Inc., Nos. 92-5113, 93-2129, 1993 WL 283884, at *1 (E.D. Pa. July 29, 1993) (holding that there could be no preclusion in this type of situation). For a discussion of these and related authority, see *infra* Part IV.

[5] The court in *Bridgestone* specifically limited its holding to proposed nationwide classes. *See Bridgestone*, 333 F.3d at 769. The arguments both for and against preclusion apply equally to any proposed class with a nontrivial number of potential claimants. Thus, this Note will not be limited to the discussion of nationwide classes.

The issue arises as follows.[6] One member in a group with a common potential claim files suit and seeks to have the group certified as a class. The court then denies certification, finding that the proposed class fails to meet one or more of the requirements of Federal Rule of Civil Procedure 23 ("Rule 23").[7] At this point, the case may proceed as a non-class action case or the plaintiff may choose to discontinue the litigation after certification is denied. After the denial of certification, a party[8] who was not involved in the first litigation, but who would have been a member of the prior class if it had been certified, files suit against the same defendant in a different court seeking to have the same class certified. The defendant may then seek to have the second court estop the attempted certification, or alternatively, may go back to the first court and seek an injunction preventing the second court from granting certification.[9]

This type of preclusion, of course, does not prevent the subsequent claimant from pursuing his individual claim; it merely prevents the subsequent claimant from certifying a class identical to one that was previously denied.[10] This preclusion is significant, however, and in many cases will be determinative of whether the subsequent claimant can, as a practical matter, pursue his individual claim at all.[11] Class certification affects the burdens, risks, and potential payoffs that parties consider in determining whether to bring litigation and whether to settle.[12] Particularly in suits where plaintiffs are seeking small amounts of money damages, the

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[6] *See, e.g., id.* at 763. This scenario is present in *Bridgestone* and is the typical fact pattern in class preclusion cases.

[7] In order to be certified as a class, the court must find that the proposed class meets the Rule 23(a) requirements of impracticability of joinder, commonality, typicality, adequacy of representation, and that the proposed class fits one of the approved class types under Rule 23(b). FED. R. CIV. P. 23.

[8] For the sake of simplicity, throughout this Note the term "plaintiff" will be reserved for the party who first seeks class certification. The party seeking certification in a subsequent suit will be referred to as the "potential claimant" or "subsequent claimant" as is appropriate to the context.

[9] *See, e.g., Bridgestone*, 333 F.3d at 763, 765.

[10] *See Bridgestone*, 333 F.3d at 769.

[11] *See, e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003) (asserting that defendants "prefer single-plaintiff lawsuits in which they possess significant advantages, including economies of scale and superior tolerance for risk").

[12] *Id.* It is reasonable to assume that if the defendant is advantaged in a single suit trial, the denial or grant of class certification will affect plaintiff's decision on whether to settle or to bring litigation.

class action's aggregation of small claims may be the only economically viable way for the possible rewards to outweigh the risks of proceeding.[13] While not formally precluding the subsequent claimant from bringing his individual claim, the *Bridgestone* approach may effectively prevent the subsequent claimant from having a meaningful chance at recovery.

This Note analyzes the arguments for and against precluding subsequent claimants from seeking certification of the same class that has been denied in a prior suit. Part II describes the arguments used by the *Bridgestone* court favoring preclusion.[14] Part III examines the doctrinal problems with precluding subsequent claimants.[15] Part IV examines Supreme Court precedents and other authority supporting the argument that the *Bridgestone* approach is inconsistent with current federal jurisprudence.[16] Finally, Part V proposes that the extent of preclusion should depend on the type of class at issue and the reasons for denial of certification in the initial case.[17]

II. THE ARGUMENTS FOR PRECLUSION

This Part describes the reasoning behind the *Bridgestone* court's decision favoring broad preclusion of subsequent certification attempts. The court cited three arguments for preclusion: an argument for efficiency, an argument for accuracy, and an argument for symmetry.[18]

For context, the facts and procedural history of *Bridgestone* will be briefly explained. The original plaintiffs filed suit against Bridgestone/Firestone, Inc. in the Southern District of Indiana seeking certification of a nationwide class of SUV owners with defective tires who had not yet suffered tire failures.[19] The District Court certified the class under Rule 23(b)(3), finding that the requirements of predominance and

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[13] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.11, at 585–86 (6th ed. 2003) (describing the class action as a mechanism for allowing small claims to overcome the relatively high fixed costs of litigation).

[14] *See infra* notes 18–41 and accompanying text.

[15] *See infra* notes 42–79 and accompanying text.

[16] *See infra* notes 80–112 and accompanying text.

[17] *See infra* notes 113–151 and accompanying text.

[18] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

[19] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 205 F.R.D. 503, 534 (S.D. Ind. 2001), *rev'd*, 288 F.3d 1012 (7th Cir. 2002) (reversing decision to certify class).

superiority in proceeding as a class were met.[20] The Seventh Circuit reversed the lower court and decertified the class.[21] In finding that the class did not meet the requirements of Rule 23(bX3), the court relied on variations in the types of tires at issue,[22] and on variations in the state laws that would have to be applied in a nationwide class.[23]

After the decertification, at least five subsequent claimants who were not involved in the first case sought to have the same nationwide class certified in various state courts.[24] After one of the state court judges certified a nationwide class, Bridgestone sought an injunction from the District Court to enforce the previous decertification decision against "any class action."[25] When this motion was denied, defendants appealed.[26] The Seventh Circuit reversed, ordering the District Court to grant an injunction prohibiting other courts from certifying a nationwide class.[27] While Bridgestone sought an injunction preventing "*any* class" from certification,[28] the Seventh Circuit specifically limited its ruling to nationwide classes identical to the class that had been denied certification.[29]

The first argument in support of the *Bridgestone* approach is derived from an interest in efficiency. A general principle underlying preclusion is that "judicial economy demands that cases not be retried continually."[30] The court in *Bridgestone* recognized this principle by stating "when federal

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[20] *See id.* at 519–32.

[21] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1021 (7th Cir. 2002), *rev'g* 205 F.R.D. 503 (S.D. Ind. 2001), *and subsequent appeal denied*, 333 F.3d 763 (7th Cir. 2003) (ruling on preclusion).

[22] *See id.* at 1018.

[23] *See id.* at 1019–20.

[24] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 765 (7th Cir. 2003).

[25] *See id.* (emphasis omitted).

[26] *See id.*

[27] *See id.* at 769.

[28] *See id.* at 765 (stating that Bridgestone sought an injunction against "*any* class action, even one limited to a single product in a single state").

[29] *See id.* at 769.

[30] JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.9, at 675. *But cf.* POSNER, *supra* note 13, § 21.13, at 576–77. Posner argues that in preclusion situations generally, the possibility of relitigation is not as inefficient as is generally thought. If an issue was fully litigated in one court, the subsequent plaintiff will only devote the resources to relitigation if he believes that there is a substantial chance the first court erred in its decision. Posner concludes that if there is a substantial chance of error in the first decision, there is no reason why relitigation should not occur. *Id.*

litigation is followed by many duplicative state suits, it is sensible to handle the preclusive issue once and for all in the original case, rather than put the parties and state judges through an unproductive exercise."[31]

The second argument derives from an interest in accuracy of decision. The Seventh Circuit was concerned that if subsequent attempts at certification were not precluded, an improper result might occur.[32] The court used the following hypothetical to illustrate the potential for an incorrect outcome.[33] In the absence of preclusion, even if ninety percent of judges would refuse to certify a particular class (thus making the "proper" decision by denying certification), class-seekers could simply re-file their case in additional courts until they find the one judge in ten who would grant certification (thus reaching the "improper" decision).[34] Applying a basic probability function,[35] the Seventh Circuit noted that if ninety percent of judges would deny certification and the class certification is attempted in ten courts, there is a sixty-five percent chance of having the class certified.[36] If certification is attempted in twenty courts, there is an eighty-eight percent chance of having the class certified.[37] As the number of attempts at certification increases, eventually the probability of finding a judge who will certify the class approaches one hundred percent. No matter how aberrant the decision to grant certification, "[a] single positive trumps all the negatives."[38] Not precluding subsequent attempts at certification leads to an improper result, meaning a decision contrary to the outcome that would be reached by a majority of judges looking at the issue.[39]

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[31] *See Bridgestone*, 333 F.3d at 766.

[32] *See id.* at 766–67.

[33] *See id.*

[34] *Id.* at 766 (noting that "if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance").

[35] The probability of certification is $1-(c^n)$ where c is the chance that any particular judge will deny certification and n is the number of courts in which certification is attempted. *Id.* at 767.

[36] *Id.* If attempted in ten courts, the formula would look like this: $1-(.90^{10}) = 1-(.35) = 65\%$.

[37] *Id.* If attempted in twenty courts, the formula would look like this: $1-(.90^{20}) = 1-(.12) = 88\%$.

[38] *See id.* at 766–67.

[39] There are two questionable assumptions underlying the court's analysis worth pointing out. First, the analysis assumes attempts at certification are costless to the claimants. Second, the analysis only works if we assume the class-seekers are either the same parties, represented by the same attorneys, or somehow in collusion. Whether these assumptions are valid or not, the court's general concern for

The final argument of the *Bridgestone* court supporting preclusion is an argument derived from the desire to treat litigants similarly. The Seventh Circuit referred to the situation absent preclusion as a "heads-I-win, tails-you-lose situation" for the plaintiffs seeking class certification.[40] Certification would "stick[ ] (because it subsumes all other suits) while a no-certification decision has no enduring effect."[41] A simple fairness argument supports the notion that a decision favoring certification and a decision rejecting certification should have the same practical effect.

The basic principles of efficiency, accuracy, and symmetry offer functional and pragmatic justifications for the approach taken in *Bridgestone*. Having examined the reasons favoring a broad preclusive effect for denials of certification, it is necessary to turn to the doctrinal objections that may be raised to its application.

III. THE ARGUMENTS AGAINST PRECLUSION

Precluding absent claimants from pursuing their claims in a subsequent class action raises several issues of basic fairness and due process. At the core of the issue is the difficulty of binding parties who were not present in a prior litigation to a decision made without their participation or even their knowledge. A basic principle of due process is that only those who were involved in a prior litigation can be bound by its judgment.[42] This principle extends to plaintiffs as well as defendants, the Fourteenth Amendment protects "persons," not "defendants."[43] The Supreme Court has found this principle to be of fundamental importance, providing an exception to the general rule only for proper classes.[44] This Part examines the difficulties of reconciling the *Bridgestone* approach to preclusion with the legal system's traditional respect for the notion that each plaintiff should have his "day in court."[45]

The concerns raised in this Part specifically, and this Note generally, do not apply to the similar but distinguishable situation in which a plaintiff

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accuracy in the law is a valid consideration.

[40] *See Bridgestone*, 333 F.3d at 767.

[41] *Id.*

[42] *See* FRIEDENTHAL ET AL., *supra* note 30, § 14.13, at 699.

[43] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

[44] *See* Hansberry v. Lee, 311 U.S. 32, 40–41 (1940).

[45] For an explanation and criticism of the "day in court" ideal, see generally Robert T. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

failing to achieve certification in one forum withdraws his case and then seeks class certification in a different forum. In that situation, the plaintiff is barred from re-arguing the certification under principles of collateral estoppel, since the plaintiff had been a party to a proceeding in which the issue was actually and finally decided.[46] The concerns raised here apply only to situations in which the subsequent claimant was not a party, formally or otherwise, to the first attempt at certification.

A. Lack of Notice

The first due process concern stems from the absence of notice required to bind potential claimants to the denial of class certification. It is well settled that in the absence of notice, a court's power to bind absent parties to a judgement is limited.[47] The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Moreover, the notice must be accompanied by an opportunity to appear; the right to notice has "little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest."[48]

By definition, the subsequent claimants were not parties to the first litigation. There was no requirement that notice be given to them or that they be allowed to appear. The Federal Rules require that notice be given to class members in certain class actions.[49] For classes certified under Rule 23(b)(3), the Rule requires detailed notice, which must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[50] The notice must inform the members of the right to opt out, the preclusive effect of a judgment if they do not opt out, and the right to appear through counsel, among other things.[51] In all other types of class actions, notice is at the discretion of the court.[52]

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[46] *See generally* FRIEDENTHAL ET AL., *supra* note 30, §§ 14.9–14.11, at 675–93.

[47] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[48] *Id.* Of course, even if there had been notice and an opportunity to appear, this still would not suffice to bind the absent parties. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." Martin v. Wilks, 490 U.S. 755, 756 (1989).

[49] *See* FED. R. CIV. P. 23(c).

[50] *See id.* R. 23(c)(2)(B).

[51] *Id.*

[52] *Id.* R. 23(c)(2)(A) (providing that in "any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class." (emphasis added)); *id.* R. 23(d) (providing that "the court may make appropriate orders . . . requiring

Moreover, in a case such as *Bridgestone*, in which the individual damages are likely to be small and the proposed class is large,[53] it is likely that many potential claimants will be unaware of the first plaintiff's filing.[54] Absent parties without notice could not be bound if they were defendants.[55] Therefore, it seems inequitable to bind absent potential claimants to what may be a dispositive resolution of their claims.[56]

B. Binding Absent Parties Without Meeting Class Requirements

Beyond the basic due process concerns relating to notice and the opportunity to be heard, there is a troubling paradox in the logic of binding absent potential claimants to a denial of certification. In denying certification to a proposed class, a court decides that the proposed class fails to meet the cohesiveness requirements of Rule 23.[57] At the same time, in binding absent potential claimants, the court determines that those claimants effectively have had their "day in court" through the attempts of the first plaintiff. This violates the most basic rule of preclusion: only parties to the first litigation can be bound by the court's decision.[58]

While courts have occasionally sanctioned binding nonparties under the doctrine of virtual representation,[59] that doctrine is inappropriate in these

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. . . that notice be given").

[53] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 765 (7th Cir. 2003) (claim involving three million vehicles).

[54] The situation may be different, of course, when the number of potential claimants is limited and easily ascertainable (e.g., an airline crash).

[55] *See* Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928) (holding that a New Jersey law was unconstitutional because it provided for simple notice to the Secretary of State as sufficient to bind an absent defendant).

[56] The Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985), suggests that foreclosing a potential absent plaintiff's claim is entitled to lower levels of due process protection than binding an absent defendant to a judgment. *Shutts*, however, can be read to give equal treatment for the subject at hand, and is discussed further in Part IV.

[57] *See* FED. R. CIV. P. 23; see *infra* Part V for a discussion of the requirements for forming a class under Rule 23.

[58] *See generally* FRIEDENTHAL ET AL., *supra* note 30, § 14.13, at 699 (discussing the general principles underlying res judicata).

[59] *See generally* Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification of a Nonparty's Claim*, 68 TUL. L. REV. 1303 (1994). The doctrine of virtual representation can bind an individual to a judgment "'even though [he is] not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representation.'" *Id.* at 1314 (quoting

circumstances. Virtual representation requires such a close identity of interests between the present and absent parties that it can be deemed fair to hold the absent party to the decision of the first court.[60] In denying a class certification, however, the court is holding that the case cannot proceed as if the named representatives adequately represent the interests of all potential claimants. Moreover, the *Bridgestone* court explicitly rejected the doctrine of virtual representation, both in principle and as applied to the particular case at issue.[61] "[O]utside the domain of class actions, precedent rather than preclusion is the way one case influences another."[62]

If the first court finds that the plaintiffs are not typical of the potential class, do not offer common questions of law or fact, or will not adequately represent the interests of the class as a whole, it is impossible to conclude that the plaintiffs in the first suit satisfy the Rule 23(a) requirements of typicality, commonality, or adequacy for the purposes of subsequent preclusion. This conflict must be resolved before subsequent claimants can be equitably bound by a decision to which they were not a party.

C. The Right to Opt Out

Also troubling is the fact that the potential claimants that were bound by the denial of certification in *Bridgestone* were never given the opportunity to opt out of the class action process in the first case.[63] A Rule 23(b)(3) class action, the type of class initially certified in *Bridgestone*, explicitly requires that the notice given to class members include notice of the right to opt out of the class litigation in order to not be bound by the decisions pertaining to the class.[64] The Supreme Court has held that this opt-out right is of fundamental constitutional importance.[65] Without a right to opt out, an absent class member in a Rule 23(b)(3) class cannot be bound to the

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Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975)).

[60] *See id.* at 1312.

[61] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 769 (7th Cir. 2003).

[62] *See id.*

[63] *See id.*

[64] *See* FED. R. CIV. P. 23.

[65] *See* Phillips Petroleum v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' . . . form to the court").

judgment.[66] Courts have also held that it is within the discretion of district court judges to allow opting out in Rule 23(b)(1) and (b)(2) classes.[67]

By definition, the subsequent claimants in the scenario discussed in this Note did not receive notice, and therefore did not have an opportunity to opt out of the proceedings. The Seventh Circuit in *Bridgestone* held that the opt-out right was a "post-certification" requirement, and therefore was not fatal to the preclusion.[68] This analysis entirely begs the question, however. The Seventh Circuit based its preclusion on the fact that the certification was treated as a sort of quasi-class.[69] In fact, the court stated, "Our suit . . . was commenced as a class action, and one vital issue was litigated and resolved on a class-wide basis: whether a *national* class is tenable."[70] The court applied the burden of class action preclusion to the subsequent claimants without according them the benefit of notice and the right to opt out.

D. The Absence of Power to Bind Absent Plaintiffs

Finally, there is a difficulty in identifying the procedural powers of a court that permit it to bind subsequent claimants. The court in the subsequent litigation can entertain a Rule 12(b)(6) motion to dismiss for failure to state a claim based on collateral estoppel through virtual representation.[71] Alternatively, the original court may issue an injunction through its equitable powers under the All Writs Act.[72] In a case such as *Bridgestone*, however, this injunction power is limited by the Anti-Injunction Act.[73] The Anti-Injunction Act prevents federal courts from interfering with state court proceedings except when authorized by statute, or when necessary to preserve jurisdiction or effectuate a judgment.[74] None of these exceptions would apply in these cases. The original court remains free to continue exercising jurisdiction and to fashion any appropriate remedy.

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[66] *Id.*
[67] *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 94 (D.C. Cir. 1997).
[68] *See Bridgestone*, 333 F.3d at 769.
[69] *See id.*
[70] *See id.*
[71] *See supra* Part III.B.
[72] *See* 28 U.S.C. § 1651 (2003).
[73] *See id.* § 2283.
[74] *See id.*

The *Bridgestone* court avoided confronting the question of its authority to bind the subsequent claimants by treating them as if they were present in the first litigation.[75] Without much discussion of how or why it was necessary to preclude the subsequent claimants from seeking certification, the court ordered an injunction.[76] Noting that "[n]ormally the second court [in this case the state court] determines the preclusive effect of a judgment," the Seventh Circuit chose to make an exception based on the pragmatic considerations."[77]

IV. SUPREME COURT PRECEDENT AND RELATED AUTHORITY FROM OTHER CIRCUITS

As mentioned in the Introduction, no other court has reached the same conclusion as the Seventh Circuit in *Bridgestone*. The Supreme Court has never addressed the issue and no reported case from lower courts has followed the same analysis. There are related cases, however, that can point to the way in which this issue would likely be resolved by the Supreme Court that were ignored or misinterpreted by the Seventh Circuit in *Bridgestone*. This Part first briefly analyzes the holdings and arguments of *Phillips Petroleum Co. v. Shutts*,[78] *Eisen v. Carlisle & Jacquelin*,[79] and *Devlin v. Scardelletti*,[80] applying the principles derived from those cases to the situation at issue in this Note. This Part then examines cases from other federal circuits that attempt to answer the question of how to treat the absent potential claimant for purposes of preclusion.

A. Related Supreme Court Precedent

Shutts explored the bounds of personal jurisdiction over plaintiffs in the class action context.[81] Specifically, it involved the question of whether absent nonresident class members could be bound by a judgment in personam.[82] It is applicable to the *Bridgestone* question because both

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[75] *See Bridgestone*, 333 F. 3d at 769.

[76] *See id.* at 766.

[77] *See id.*; *see also supra* Part II (discussing the pragmatic considerations used by the court).

[78] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[79] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[80] Devlin v. Scardelletti, 536 U.S. 1 (2002).

[81] *See Shutts*, 472 U.S. at 797.

[82] *See id.* at 805.

personal jurisdiction and preclusion of subsequent claimants are at their core questions of a court's power to bind absent parties.

The Court in *Shutts* found, first, that absent class action plaintiffs were not entitled to the same level of due process protection as defendants, reasoning that they were less burdened because they were not forced to appear against their will.[83] In fact, absent plaintiffs, unlike defendants, do not have to appear at all.[84] The Court also found that, despite the option of absent class members to do nothing, the court "must provide minimal procedural due process protection."[85] This protection included, at a minimum, "the best practicable" notice of the pendency of the class action, the opportunity to appear and to be heard, and "an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."[86]

The *Bridgestone* court ignored this clear constitutional mandate to provide notice and the opportunity to opt out by holding that the subsequent claimants were effectively parties to the prior litigation because their interests were adequately represented.[87] The distinction drawn by the Seventh Circuit is really no distinction at all. The Supreme Court in *Shutts* explicitly noted that the absent plaintiffs had been adequately represented.[88] If the absent plaintiffs in *Shutts* had not been adequately represented, the Court would simply have reversed the certification decision on Rule 23(a) grounds, never reaching the due process issue.

Moreover, in *Eisen*, the Supreme Court expressly addressed the question of whether adequate representation could substitute for defective notice in a class action.[89] The Court responded to the argument that adequate representation alone sufficed, holding that "this view has little to commend it. . . . Rule 23 speaks to notice as well as to adequacy of representation and requires that *both* be provided."[90] The Seventh Circuit in *Bridgestone* did not address this seemingly clear mandate from *Eisen*.

Another more recent case dealing with the rights of absent class members is *Devlin v. Scardelletti*, a case that was cited by the *Bridgestone*

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[83] *See id.* at 808.

[84] *Id.*

[85] *See id.* at 811–12.

[86] *Id.* at 812.

[87] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 768–69 (7th Cir. 2003).

[88] *See Shutts*, 472 U.S. at 808 n.1.

[89] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

[90] *See id.* (emphasis added).

court in support of its reasoning.[91] A closer analysis of the Supreme Court's holding in *Devlin* shows, however, that the Seventh Circuit misapplied *Devlin* in holding that subsequent claimants were precluded by the initial denial of class certification.

Devlin, like *Shutts*, dealt with an issue that may initially seem tangential to the *Bridgestone* issue. *Devlin* examined the question of whether non-named parties who did not intervene in the class action had a right to appeal the district court's determination that the class settlement was fair.[92] The Court held that non-named members who objected to the settlement at a fairness hearing have the right to bring an appeal.[93] The Seventh Circuit in *Bridgestone* cited *Devlin* as evidence that non-named class members have the same benefits and burdens as named class members.[94] The *Bridgestone* court held that "[t]he premise of allowing class members to seek review by a higher court is that otherwise they would be bound by defeat."[95]

This reading of *Devlin*, however, is mistaken for several reasons. First, it collapses the distinction between a certified class (as in *Devlin*) and a class that has merely been proposed. Second, it ignores the principles underlying *Devlin* by selectively emphasizing the one aspect of the holding that would support preclusion. *Devlin* recognized first that "[n]onnamed class members . . . may be parties for some purposes and not for others."[96] Additionally, and more importantly, *Devlin* was foremost concerned with the principle that courts should not "deprive nonnamed class members of the power to preserve their own interests."[97] Under the factual circumstances of *Devlin* in which non-named parties in a class action believed their interests diverged from that of the named plaintiffs, the Court could best serve its function of protecting the non-named parties' rights by treating them as parties. In a factual situation like that in *Bridgestone*, the same paramount interest is served by allowing absent parties to have their "day in court," by treating them as if they were *not* parties to the initial certification decision. Thus, a closer reading of *Shutts* and *Devlin* leads to

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[91] *See Bridgestone*, 333 F.3d at 768.

[92] *See* Devlin v. Scardelletti, 536 U.S. 1, 4 (2002). Note that Rule 23 requires that the court examine any proposed settlement for fairness. *See* FED. R. CIV. P. 23(e)(1)(A).

[93] *Devlin*, 536 U.S. at 14.

[94] *See Bridgestone*, 333 F.3d at 768.

[95] *See id.*

[96] *See Devlin*, 536 U.S. at 9–10.

[97] *See id.* at 10.

the conclusion that subsequent claimants should not be bound by the determinations of the prior court denying certification.

B. Related Authority from Other Circuits

In addition to Supreme Court precedents that shed light on the proper outcome in a *Bridgestone* situation, cases from other federal courts are instructive. There are two reported cases dealing with the same issue as *Bridgestone* that reach the opposite result, along with several others that decide closely related issues.

One of the two cases dealing with the identical issue involved in *Bridgestone*, *Furey v. Geriatric & Medical Centers, Inc.*,[98] cites no authority and offers no analysis to support its finding that subsequent classification attempts should not be precluded. It merely states: "The fact that the plaintiffs [from the first case] . . . have been precluded from seeking recovery on behalf of the putative class does not—indeed, could not lawfully—preclude other members of the class from bringing an action on behalf of the class."[99]

The Fifth Circuit, in *J.R. Clearwater, Inc. v. Ashland Chemical Co.*,[100] offers only slightly more analysis in the course of rejecting the defendant's arguments for preclusion. The court in *J.R. Clearwater* held that it did not have the power to enjoin state court proceedings because the injunction would not fall within any of the exceptions of the Anti-Injunction Act.[101] The court relied on the differences in state and federal class action rules and the discretion inherent in the class certification decision.[102] Additionally, the Fifth Circuit recognized that "[a]ny doubts as to the propriety of an injunction must be resolved in favor of allowing the state court action to go forward."[103] The decision and logic in *J.R. Clearwater* are the opposite of those in *Bridgestone*. In light of the implications of the

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[98] Furey v. Geriatric & Med. Ctrs., Inc., Nos. 92-5113, 93-2129, 1993 WL 283884 (E.D. Pa. July 29, 1993).

[99] *Id.* at *1.

[100] J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176 (5th Cir. 1996). Unlike *Bridgestone*, *J.R. Clearwater* does not deal with identical classes; it involves classes that have substantial overlap between their members. *Id.* at 178. However, the Anti-Injunction Act analysis of *J.R. Clearwater* applies regardless of whether the similarity between classes is total or merely substantial.

[101] *See id.* at 178–79; *see supra* Part III.D (discussing the Anti-Injunction Act).

[102] *See J.R. Clearwater*, 93 F.3d at 180.

[103] *See id.* at 179.

Bridgestone holding discussed in Part III, the reasoning in *J.R. Clearwater* seems to better comport with due process requirements.

While *Furey* and *J.R. Clearwater* are the only two cases to address the same issue as *Bridgestone*, several other courts have dealt with the question of whether potential class members are bound by a judgment when the class is either never certified, or certified and subsequently decertified. The consensus among the cases is that an absent potential class member will not be bound by any decisions of the first court if the action does not proceed as a class action.[104]

The Courts of Appeals for the Seventh, Ninth, and the District of Columbia Circuits have examined the question of whether a grant of summary judgment for the defendant before a certification decision will bind absent potential class members. All held that it will not.[105] The Seventh Circuit held that "the defendants, by moving for summary judgment prior to the class determination and the sending out of class notice, assumed the risk that a judgment in their favor would not protect them from subsequent suits by other potential class members."[106] The Seventh and Ninth Circuits applied the same logic concerning preclusion after a pre-certification dismissal of the action.[107] While according preclusive effect to a summary judgment or dismissal is in some ways different than according preclusive effect to a denial of certification, the underlying principle is the same. As Judge Posner stated in *Morlan*, "[u]ntil certification there is no class action but merely the prospect of one."[108]

In another case directly analogous to a denial of certification, the Third Circuit held that a decertification decision is not entitled to preclusive effect against those elsewhere participating in a class action.[109] The court

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[104] *See* Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001); Schwarzschild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995); Roberts v. Am. Airlines, Inc., 526 F.2d 757, 763 (7th Cir. 1975).

[105] *See Curtin*, 275 F.3d at 93; *Schwarzschild*, 69 F.3d at 297; *Roberts*, 526 F.2d at 763.

[106] *See Roberts*, 526 F.2d at 762–63; *see also Schwarzschild*, 69 F.3d at 297 (holding that defendants, by moving for summary judgment before certification, can only rely on " 'the slender reed of stare decisis,' " not preclusion, as protection against subsequent suits (quoting Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382 (D.C. Cir. 1980))).

[107] *See* Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, 616–17 (7th Cir. 2002); Diaz v. Trust Territory, 876 F.2d 1401, 1411 (9th Cir. 1989).

[108] *Morlan*, 298 F.3d at 616.

[109] *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145–46 (3d Cir. 1998).

in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation* held that a decertification decision is not the type of final judgment that would have preclusive effect and as a result would not qualify for an exception under the Anti-Injunction Act.[110]

V. DISTINGUISHING AMONG THE REASONS FOR DENIALS OF CERTIFICATION

A court may deny certification for many reasons,[111] and in order to reconsider the pragmatic concerns discussed in Part II with the due process concerns in Part III, it is necessary to distinguish between the various reasons why a certification is denied.

This Part begins by examining the requirements common to all class actions, which are found in Rule 23(a). This Part then considers the various types of classes discussed in Rule 23(b) and how each class should be treated with regard to preclusion issues.

A. Rule 23(a) Requirements

To be certified, the proposed class must meet the four requirements of Rule 23(a).[112] First, the members of the proposed class must be "so numerous that joinder of all members is impracticable."[113] Second, there must be "questions of law or fact common to the class."[114] Third, "the claims or defenses of the representative parties . . . [must be] typical of the claims or defenses of the class."[115] And finally, the court must find that "the representative parties will fairly and adequately protect the interests of the class."[116] If a proposed class fails to meet any of these requirements, it is unnecessary to consider the requirements of Rule 23(b).[117]

The first three of these requirements do not pose any difficult issues regarding preclusion. The fourth requirement, adequacy of representation, however, does merit further discussion. The adequacy inquiry includes four

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[110] *See id.* at 146.

[111] *See* FED. R. CIV. P. 23(a) and (b).

[112] *See id.* R. 23(a).

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See* FRIEDENTHAL ET AL., *supra* note 30, § 16.2, at 740–41 (describing the Rule 23(a) and (b) inquiries as a "two-step" process).

factors.[118] First, the named parties and their lawyers must assert the absent class members' claims. Second, there must be an "identity" of claims within the class. Third, the named parties and their lawyers must be competent, in light of the size and complexity of the class action. And fourth, there must be no conflicts of interest between the named parties, their counsel, and the absent class members.[119] This final requirement for adequacy of representation depends primarily on whether there is relative uniformity of interests among the class members.[120] If there are disparate interests within the class, there may not be a named party who could adequately represent *all* of the interests of the class as a whole.

Denials of certification based on inadequacy of representation can thus be further divided into two categories: inadequacy because of deficiency and inadequacy because of conflict.[121] In the first type of inadequacy denials, it seems clear that there can be no preclusion of subsequent claimants. If the basis of the denial of certification is that the lawyer seeking certification is not adequate, then this provides the strongest case for not precluding subsequent claimants. Not only did the subsequent claimants not have their day in court, but the plaintiffs who did have their day in court were represented by an attorney who was found to be lacking in some respect. It could be argued, allowing for differences among judges, that the success of the attorney in the second suit, in circumstances similar to those present in Bridgestone, raises the presumption that the attorney in the first suit was not adequate because he failed to secure certification.

If, on the other hand, certification is denied because there are irreconcilable conflicts within the class that would render any named representative inadequate, the issue of whether preclusion is proper is more difficult. If a court held there are classes with irreconcilable differences, thus denying certification, but proceeded with a sub-class of the original proposed class, the court may need to issue an injunction to preserve its

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[118] *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of* General Telephone v. Falcon, 54 OHIO ST. L.J. 607, 635 (1993).

[119] *Id.*

[120] *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 44–45 (1940) (holding that African-American homebuyers were not adequately represented by class representatives that sought to enforce racially restrictive covenant). *See generally* FRIEDENTHAL ET AL., *supra* note 30, § 16.2, at 746 ("The most critical factor to be scrutinized when determining adequacy of representation is whether conflicting or antagonistic interests exist between the representatives and other members of the class.").

[121] *See* Downs, *supra* note 120, at 644.

jurisdiction. In this circumstance, a subsequent court would be directly overruling the considered decision of the original court, and thus should proceed with caution.

B. Rule 23(b) Classes

If a proposed class meets the requirements of Rule 23(a), the court next considers if it falls into any of the types of permissible classes in 23(b).[122] The categories are the injunctive class action,[123] the limited fund class action,[124] and the opt-out class action.[125] The different natures and effects of each type of class action lead to different conclusions about the appropriateness of according a denial of certification preclusive effect against subsequent claimants.

1. *Injunctive Classes*

In cases seeking injunctive relief (including proposed (b)(1)(A) classes, which may seek injunctive relief as well as money damages), precluding subsequent claimants from certifying classes is not as inequitable as it is in other types of class actions. For instance, injunctive classes are less likely to be extinguished by a denial of classification since they do not seek money damages.[126] In proposed class actions that seek small amounts of monetary damages, the inability to proceed as a class may make proceeding at all economically impossible. A claimant seeking injunctive relief, however, can achieve the same relief whether proceeding as a class or not. In fact, it is the defendant in such cases who may wish to have the class certified to avoid inconsistent and incompatible equitable judgments.[127]

In cases when a court denies certification because a class would not meet the requirements of Rule (b)(2) or (b)(1)(A), the court has already decided that the class is cohesive enough to meet the requirements of Rule 23(a) and that class members have been adequately represented at the first

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[122] *See* FRIEDENTHAL ET AL., *supra* note 30, § 16.2, at 747.

[123] FED. R. CIV. P. 23(b)(2). For the purposes of this Note, the 23(b)(1)(A) class action will be considered along with the 23(b)(2) class action; the differences are irrelevant to the discussion.

[124] *Id.* R. 23(b)(1)(B).

[125] *Id.* R. 23(b)(3).

[126] *See supra* text accompanying notes 11–13.

[127] *See* FED. R. CIV. P. 23(b)(1)(A), (b)(2).

stage.[128] Therefore, the availability of proceeding as an individual, coupled with the likelihood that a defendant in a purely injunctive suit will not oppose certification, combine to allay fears about overbroad application of preclusion doctrines.

2. *Limited Fund Classes*

Classes can also be certified when "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[129] These limited fund classes are appropriate when there is a limited fund available to potential claimants and the first to sue would recover at the expense of those slower to file.[130] This type of class is designed to prevent the "race to the courthouse" scenario, in which "[e]arly-filing claimants would receive full value on their claims, and later-filing claimants would receive pennies on the dollar or nothing."[131] The availability of these classes mitigates the problem caused by situations in which defendants with limited funds lack incentives to join all potential claimants in one case.[132]

Limited fund classes are similar to the opt-out classes discussed below,[133] but have one special, if obvious, feature that merits discussing. The answer to the question of whether or not there is a limited fund may change over time. For example, a company's business profits may decline or more claimants (or claimants with more costly injuries) may emerge.[134] Either of these scenarios will affect the risk of prejudice to late-coming

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[128] *See supra* Part V.A.

[129] FED. R. CIV. P. 23(b)(1)(B).

[130] *See* FRIEDENTHAL ET AL., *supra* note 30, § 16.2, at 748.

[131] JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 131 (2002).

[132] *Id.*

[133] Some plaintiffs have sought to have their mass tort classes certified as Rule 23(b)(1)(B) classes rather than (b)(3), but courts are reluctant to forego the class member protections of (b)(3) without a genuinely limited fund. *See* FRIEDENTHAL ET AL., *supra* note 30, § 16.2, at 747 n.50.

[134] One need only think of high profile class actions such as asbestos cases to see how estimates of potential liability may change with advances in medical science. For a description of the slow process in which manufacturers and scientists came to increasingly recognize the hazards of asbestos, see *Borel v. Fibreboard Paper Products Corp.* 493 F. 2d 1076, 1083–85 (5th Cir. 1974).

claimants. It would be inappropriate to forever foreclose the possibility of finding a limited fund based on a snapshot of a company's assets and potential liabilities at one given moment. Therefore, Rule 23(b)(1)(B) denials based on the absence of a truly limited fund should not be given preclusive effect.

3. *Opt-Out Classes*

Classes certified under Rule 23(b)(3), unlike the other types of classes, require that the notice given to potential class members inform them of their right to opt out of the class to avoid being bound by its judgments.[135] Hence, they have become known as "opt-out classes." This type of class, which was the proposed class in *Bridgestone*,[136] presents distinct issues. Rule 23(b)(3) lists the considerations courts should weigh in deciding whether or not to certify a class.[137] The court must decide whether common questions predominate over individual issues, and whether the class would be a superior method of proceeding.[138] In making this determination, the court looks at:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[139]

There are two approaches that courts could take in assessing the applicability of preclusion against subsequent claimants proposed under Rule 23(b)(3) class actions. First, given the special notice and opt-out requirements discussed above,[140] a court could take the position that it is

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[135] *See* FED. R. CIV. P. 23(b)(3).

[136] *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 205 F.R.D. 503, 519–32 (S.D. Ind. 2001), *rev'd*, 288 F.3d 1012 (7th Cir. 2002) (reversing certification decision), *and subsequent appeal denied*, 333 F.3d 763 (7th Cir. 2003) (ruling on preclusion).

[137] *See* FED. R. CIV. P. 23(b)(3).

[138] *Id.*

[139] *Id.*

[140] *See supra* Parts III.A and III.C.

never appropriate to bind a subsequent claimant to a decision in which he was not given notice and an opportunity to opt-out.[141] Unlike the Seventh Circuit in *Bridgestone* which held that "[n]o one is entitled to opt out of the certification [process],"[142] courts could reasonably determine that in potential Rule 23(b)(3) classes, everyone is entitled to opt out of the certification process.

In the alternative, courts could adopt a particularized approach that examines the predominance and superiority considerations listed in Rule 23(b)(3). For example, the determination of whether or not it would be desirable to concentrate the litigation in a particular forum[143] obviously depends on the particular forum at issue. A court may find it unfair or unwise to concentrate litigation in its district, if for example, while venue and jurisdiction would be technically proper, there might be a district that would be more convenient for all of the parties except the initial plaintiff. If certification is denied on desirability of concentration grounds, this should not preclude relitigation of the certification issue in another forum.

Likewise, the amount of litigation underway concerning the claim[144] will change over time, as will the lessons learned from observing the course of the litigation. If, for example, certification is denied because there are ongoing suits elsewhere at the time of the initial plaintiff's attempt at certification, it would be appropriate to reexamine the issue if the claims in those suits were not economically viable and were dropped before coming to a resolution. A denial of certification based on this consideration should be available for re-examination on a case-by-case basis.

A denial based on the potential difficulties faced in managing a class action[145] should similarly be open to reexamination for two reasons. First,

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[141] In thinking about the importance of the notice and opt-out provisions, it is useful to imagine the difference between a typical injunctive class action, which might involve, for example, prisoners in a specific prison filing a civil rights suit or all of the female employees of a company filing a discrimination suit, and a Rule 23(b)(3) potential plaintiff class, which might involve the drivers of three million cars, *see, e.g.*, *In re* Bridgestone/Firestone Tires Prods. Liab. Litig., 333 F.3d 763, 765 (7th Cir. 2003), who would have no way of knowing who else might be in the class with them. In the former case, it is much more reasonable to assume that potential claimants have ways of identifying one another and influencing the course of the litigation, therefore these claimants are less in need of notice or the opportunity to opt out.

[142] *Id.* at 769.

[143] FED. R. CIV. P. 23(b)(3)(C).

[144] *Id.* R. 23(b)(3)(B).

[145] *Id.* R. 23(b)(3)(D).

the decision of whether or not to certify a class is always discretionary,[146] and this is an area in which the discretion should be broad.[147] Two different judges may look at the same set of facts and have different perceptions of manageability, or different skills and experiences in management, which makes the idea of a "proper" answer in this context unworkable. This fact, which makes manageability subjective, eliminates or at least mitigates the concern of the *Bridgestone* court that a "no preclusion" rule would lead to mistakes.[148] Second, as litigation matures, the difficulties of class action management may become less pronounced. For example, if all cases in a particular controversy begin to settle for a predictable amount of money, the difficulties of class management may disappear.

Assessing the interest of individuals in controlling their own litigation[149] is more difficult, if not impossible, when assessing the preclusive effect of denials of certification. It seems unnecessary to hold up individual interests in preventing subsequent claimants from pursuing their claims as a class if the subsequent certification of the class would not affect the original plaintiff's chances of obtaining relief.

Therefore, under any of the criteria of Rule 23(b)(3) opt-out class actions, it is unnecessary and unfair to adopt a blanket rule preventing subsequent attempts at certification. Courts should be responsive to changing factual circumstances that affect the valuation of the Rule's criteria.

CONCLUSION

This Note has examined the arguments for and against precluding subsequent claimants from re-arguing class certification after a denial of class certification in a prior litigation. There are strong pragmatic arguments arising from concerns of efficiency, accuracy, and symmetry that may support adopting a broad preclusive policy. The difficulties inherent in binding subsequent claimants that lacked notice or opportunity to

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[146] *See, e.g.*, Mace v. Van Ru. Credit Corp., 109 F.3d 338, 340, 342 (7th Cir., 1997); Hartman v. Duffey, 19 F.3d 1459, 1471 (D.C. Cir. 1994).

[147] *Hartman*, 19 F.3d at 1471 (noting that trial courts are uniquely equipped to make class certification decisions because they have the "primary responsibility of ensuring the 'orderly management of litigation' which is the purpose of class actions" (quoting McCarthy v. Kleindients, 741 F.2d 1406, 1410 (D.C. Cir. 1984))).

[148] *See supra* notes 32–38 and accompanying text for a discussion of the *Bridgestone* analysis concerning mistakes.

[149] FED. R. CIV. P. 23(b)(3)(A).

participate in the first action, however, must be factored into the decision as well. In fashioning rules in this uncharted territory, courts must resist the blanket approach of the *Bridgestone* court and examine the policies, rationales, and circumstances of each type of class action individually in order to reach a decision that is fair to subsequent claimants.